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Human rights bodies and mechanisms

Progress report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights

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I. Introduction

1. On 13 June 2013, the Human Rights Council adopted its resolution 23/9, in which it requested the Advisory Committee to submit a research-based report to the Council, at its twenty-sixth session being held in June 2014, on the issue of the negative impact of corruption on the enjoyment of human rights, and to make recommendations on how the Council and its subsidiary bodies should consider this issue.

2. During its eleventh session, on 16 August 2013, the Advisory Committee established a drafting group composed of Mr. Saeed Mohamed Al Faihani, Ms. Laurence Boisson de Chazournes, Mr. Mario L. Coriolano, Mr. Latif Hüseynov, Mr. Alfred Ntunduguru Karokora, Mr. Obiora Chinedu Okafor, Ms. Katharina Pabel (Rapporteur), Ms. Anantonia Reyes Prado, Mr. Dheerujlall Seetulsingh, Mr. Ahmer Bilal Soofi and Mr. Imeru Tamrat Yigezu (Chairperson). The Committee tasked the drafting group with the preparation of the said report.

3. At the same session of the Advisory Committee, the drafting group developed a questionnaire, in accordance with Council resolution 23/9, which was disseminated to different stakeholders and had a deadline of 31 October 2013. On 30 October 2013, the deadline for submission of responses was extended to 14 November 2013. As at 4 February 2014, a total of 72 responses had been received: 37 from States, 17 from national human rights institutions, 13 from non-governmental organizations (NGOs) or civil society, and 5 from international or regional organizations or academic institutions.

4. At its twelfth session, held from 24 to 28 February 2014, the Advisory Committee and the drafting group discussed, in both public and private meetings, the "Preliminary research-based report on the negative impact of corruption on the enjoyment of human rights" (A/HRC/AC/12/CRP.3), which had been prepared in the intersessional period by Ms. Pabel, the rapporteur of the drafting group. During the public discussion, a number of members of the Committee as well as States and other stakeholders made comments on the preliminary draft of the report. The Advisory Committee was encouraged to continue its work on the draft report, including by providing useful recommendations therein. On the basis of the discussions of the thirteenth session of the Committee, the draft report was further developed.

II. What is corruption?

A. Definition of corruption and scope of the current study

5. To this day, there is no single, consistent and recognized definition of corruption at the international level. Remarkably, even the United Nations Convention against Corruption[1] does not provide a definition of corruption, even though the purpose of this Convention is specifically to promote and strengthen measures to prevent and combat corruption more efficiently and effectively, and to promote and support international cooperation in the prevention of and fight against corruption.[2] One very common approach

[1] The United Nations Convention against Corruption entered into force in 2005. See http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

[2] See article 1 of the United Nations Convention against Corruption.

to the notion of "corruption" is the definition proposed by Transparency International.[3] According to that definition, corruption is "the abuse of entrusted power for private gain".[4] On the one hand, this is a rather broad definition which encompasses a wide range of different behaviours. Unlike the provisions of criminal law, which determine specific offences, the above-mentioned definition is more open. On the other hand, it has been argued that the notion of all three elements of the definition, that is to say "abuse", "entrusted power" and "for private gain", can lead to the exclusion of conducts that should be characterized as corruption too. For instance, the use (or abuse) of illegally claimed power can lead to corruption. Therefore, even this rather broad definition can be too narrow in respect of specific forms of misbehaviour that should also be regarded as corruption.

6. The drafting group did not deem it necessary for the purposes of this report to develop a clear-cut definition of corruption. Instead, it decided to look at the link between corruption and the enjoyment of human rights, for which purpose it focused on the results of the conduct. Moreover, the development of a definition of corruption did not fall within the scope of the request of the Human Rights Council to the Advisory Committee, which was to prepare a report on the negative impact of corruption on the enjoyment of human rights.

B. Different categories of corruption

7. Even though there is no overall agreed definition of corruption, different forms of corruption have been recognized. When looking at corruption from a human rights perspective, it is interesting to differentiate between corruption by the State (corruption in the public sector) and corruption by non-State entities (corruption in the private sector).[5] Corruption in the public sector can occur in government, in administration, in the legislature and in the judiciary. In these contexts, it is clear that the State is responsible for any violation of human rights resulting from the conduct of persons acting in their public capacity. Furthermore, the State can also be responsible for human rights violations caused by corruption in the private sector. The duty of States to protect against human rights violations obliges States to protect people and consequently requires States to prevent human rights violations by third parties. According to this dimension of human rights, States must act (and not only refrain from violating human rights) in order to fulfil their human rights obligations.

8. Recognition of these two categories should not obscure the fact that corruption also takes place in international or global settings. In parallel to the two above-mentioned categories, corruption at the international level occurs in international organizations and in transnational business enterprises. In the first case, international organizations and their member States are responsible for the conduct of the organization, and especially for any resulting violation of human rights. It is more difficult to establish responsibility of specific States for corruption occurring within the transnational business sector. On the one hand, each State is responsible for fulfilling its obligations resulting from human rights treaties or from national constitutional orders. Hence, it has to combat corruption committed by transnational business enterprises acting on its territory. On the other hand, it is quite clear that combating corruption in transnational business enterprises adequately and effectively

[3] Transparency International is an internationally recognized non-governmental organization promoting "a world in which government, politics, business, civil society and the daily lives of people are free of corruption".

[4] See http://www.transparency.org/whatwedo.

[5] See, for example, Sharon Eicher, *Corruption in International Business* (Gower Publishing Company, 2009), p. 4 et seq.

requires transnational and international efforts. The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,[6] which were aimed at ensuring the implementation of human rights in relation to business entities, failed to draw the link between business, human rights and corruption. Consequently, the human rights approach to corruption established in the present report can add a new aspect to the existing guidelines.

III. In what respect does corruption have a negative impact on the enjoyment of human rights?

9. A link between human rights and corruption can be established in two different ways:

(a) There can be a violation of human rights through a corrupt act;

(b) There can be a violation of human rights through anti-corruption measures.

10. Although it is important not to forget the second aspect (the violation of human rights through anti-corruption measures), especially if instruments of criminal prosecution are applied in combating corruption, the report — in line with the request by the Human Rights Council — focuses on the first aspect.

11. As a result of developments over the past years, it has now been clearly established that impairment of the enjoyment of human rights is among the negative impacts of corruption. For example, the Office of the United Nations High Commissioner for Human Rights (OHCHR) stated in November 2013:

> "In recent years, United Nations and regional organizations have increasingly recognized the negative impacts of corruption on the enjoyment of human rights."[7]

12. As corruption can occur in many forms and contexts, it is nearly impossible to identify all of the human rights that can be violated by corruption. To give some examples: If there is corruption in the education sector, the right to education can be violated. If there is corruption in the judiciary, the right to access to court and the right to a fair trial can be violated. If there is corruption in the health sector or the social welfare sector, the right to access to medical service or the right to food can be violated (among others). Moreover, the principle of non-discrimination can be affected if a person has to bribe someone in order to get a public merit or access to a public service. It is difficult to find a human right that cannot be violated by corruption.

13. This view is supported by many of the responses to the questionnaire, by different stakeholders. The responses make it clear that corruption has a negative impact on the enjoyment of human rights. They show that a wide range of human rights can be violated by corruption. These include economic and social rights, such as the right to work, the right to food, the right to housing, the right to health, the right to education, and the right to public services; the right to development; and the principle of non-discrimination; as well as civil and political rights, such as the right to a fair trial and the right to public participation. The responses to the questionnaire indicate that nearly every human right can

[6] The Guiding Principles were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (see the annex to the final report of the Special Representative to the Human Rights Council (A/HRC/17/31)) and were endorsed by the Council in its resolution 17/4 of 16 June 2011.

[7] OHCHR, *The Human Rights Case Against Corruption* (Geneva, 2013), p. 4.

be affected by corruption; this point is highlighted in the OHCHR response to the questionnaire.

14. As States have different kinds of obligations resulting from their human rights commitments, it is useful to classify the possible violations of human rights caused by corruption according to the different obligations imposed on States:

(a) Firstly, corruption can concern individuals (individual negative impact). There is often a direct violation of the human rights of the individual who is affected by corruption. Depending on the context in which corruption occurs, a wide range of different human rights can be violated. Corruption frequently results in discriminatory access to public services.[8] The impact on an individual can also be the result of an indirect effect from corruption. For example, if public authorities illegally allow the deforestation of land in return for a bribe, then the right to food, the right to housing and the right to health of the people living in the area concerned may be violated;

(b) Secondly, corruption can concern specific, identifiable groups of individuals (collective negative impact). This category includes the effects of corruption that not only affect individuals but also impact upon groups of individuals. For example, corruption can exclude the poor from access to goods and services offered by the administration, or from access to justice. Or, coming back to the example mentioned above, illegal deforestation may affect specific ethnic minorities living in the areas concerned. It can be concluded that marginalized groups such as women, children, persons with disabilities, the elderly, the poor or people belonging to ethnic minorities are particularly affected by corruption. This is especially true in relation to access to public services and welfare, which is often of tremendous importance for people belonging to disadvantaged groups. In its statement made in November 2013, OHCHR cites the undermining of access to justice for disadvantaged groups as an example of the negative impact of corruption on the enjoyment of human rights.[9] Sometimes, corruption is only one element of a human rights violation or one factor aggravating an already existing human rights violation concerning specific groups. For example, if the right to education for marginalized groups is already limited due to discriminatory access requirements, the demand of an official to pay a bribe aggravates the human rights violation. Another example is persons deprived of their liberty who can be victims of corruption and at the same time of torture or other inhumane treatment;

(c) Thirdly, corruption can concern society at large (general negative impact). This means that in addition to the effect that corruption has on individuals or groups, there are also negative impacts upon society at large, whether this is in a national or an international sense. There are two main aspects that are frequently mentioned in discussions of the negative impact of corruption on human rights.[10] The first aspect relates to the financial and economic resources that are affected by corruption. Corrupt practices divert funds from development and therefore imply a reallocation of funds that may interfere with the effective enforcement of human rights, especially for vulnerable people. Corruption reduces the resources available for the progressive realization of economic, social and cultural rights (and therefore undermines States' obligations under article 2 of the International Covenant on Economic, Social and Cultural Rights). The aims of eradicating poverty and providing for sustainable development, as general targets of human rights, are

[8] See, for example, *The Human Rights Case Against Corruption*, p. 4.
See also International Council on Human Rights Policy and Transparency International, eds., *Corruption and Human Rights: Making the Connection* (2009), p. 32 et seq.

[9] *The Human Rights Case Against Corruption*, p. 4.

[10] These aspects are also discussed in the OHCHR response to the questionnaire.

on the verge of being missed. The second aspect relates to the realization of democracy and the implementation of the rule of law. If the authorities of a State are pervaded by corruption, the people's confidence in the government, and eventually in the democratic order and the rule of law, is undermined.

15. Another approach to classifying types of corruption is to differentiate between active and passive corruption. This distinction is discussed, for example, in the commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[11] which is sponsored by the Organization for Economic Cooperation and Development (OECD). Active corruption means spending money or providing other benefits to achieve undue advantages, whereas passive corruption refers to the receipt of money or other benefits as an undue advantage. The distinction between offering bribes and taking bribes is very clear. Nevertheless, it is doubtful that this distinction may be helpful from a human rights perspective. The focus of this report is on the negative impact of corruption on the enjoyment of human rights and therefore it has a victim-oriented approach. In cases of corruption, it can be difficult to determine whether the victim has taken part in the corrupt act actively or passively. It is even possible that the victim has stood outside the corrupt agreements. For example, where people are forced to pay to access public services, those who pay bribes are active in corruption but they are also victims. For this reason, the OECD anti-bribery convention does not use the term "active bribery", in order to avoid it being misunderstood as implying that the briber has taken the initiative and the recipient is a passive victim. It is more useful to determine which party is the victim in a corrupt setting. In many cases, this can be determined by examining the distribution of power between the parties to the corrupt agreement. Typically, the less powerful or even oppressed party will be the victim.

IV. What is the value in linking corruption and its negative impact with the enjoyment of human rights?

16. Corruption is mainly dealt with in a criminal perspective.[12] Anti-corruption measures — in the national and the international contexts — primarily concentrate on the prosecution of the related criminal offences. International anti-corruption treaties encourage or even oblige the signing States to undertake efforts within their legal order to criminalize certain kinds of behaviour defined as corruption. However the United Nations Convention against Corruption and regional conventions against corruption include preventive measures (e.g. accountability, transparency, and access to public information) that member States are obliged to promote. Without disregarding these efforts, anti-corruption measures are focused on consideration of criminal offences, the necessary sanctions and international cooperation in prosecution. Situating anti-corruption measures within the criminal law narrows the perspective to the perpetrators. The purpose of a criminal proceeding is — roughly speaking — to determine who the person is who is responsible for the offence. Focusing criminal proceedings on the perpetrator can lead to a loss of focus on the victim of the corruption. The position of those affected by corruption is not very strong in criminal

[11] Available from http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf. The Convention was adopted by the Negotiating Conference on 21 November 1997 and entered into force on 15 February 1999. See also the "Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (CAT/C/52/2), para. 72 et seq.

[12] Leonie Hensgen, "Corruption and human rights – making the connection at the United Nations", in the *Max Planck Yearbook of United Nations Law*, Armin von Bogdandy and Rüdiger Wolfrum, eds., vol. 17, pp. 197–219 (200) (Brill and Nijhoff, 2013).

proceedings. Furthermore, the criminal approach does not offer ways of addressing the structural problems caused by corruption. It is concentrated, by its very nature, on the single offence, and typically cannot deliver the collective impact and the general impact referred to in this report.

17. Corruption can also be combated by applying remedies from private law. This approach is quite common among States. In international law, the Civil Law Convention on Corruption, which was adopted by the Council of Europe in 1999,[13] deals, inter alia, with compensation for damage, liability, the validity of contracts and the protection of employees, and therefore focuses on the consequences of corruption in private law. One distinction between the criminal law approach and the private law approach in the fight against corruption is that the latter addresses the impact of corruption on the person concerned and aims to obtain compensation.

18. A human rights perspective on the impact of corruption can add an approach that moves the victims to the centre of the fight against corruption. It does so by highlighting the negative impacts that corruption brings to the individual concerned, to groups of individuals typically affected by corruption (which are very often marginalized groups), and to society at large. Linking corruption and human rights can show the social implications — the effects that corruption has on human lives. It can help people to make connections between corruption and problems that they suffer from in their lives, and can be an important way of making corruption a public issue. In this way, the social impact of corruption is made visible; it generates awareness in society about the consequences of this scourge and creates new alliances in the fight against corruption.

19. Moreover, the human rights perspective on the negative impact of corruption reveals that the State bears ultimate responsibility for corruption. This responsibility means, as a first step, abstaining from corruption in order to avoid human rights violations. As a second step, the State's responsibility with regard to human rights means reacting to the negative impact of corruption in order to fulfil human rights obligations. In the latter context, criminal prosecution is one instrument in combating corruption and its negative impact on the enjoyment of human rights. Criminal prosecution is, however, not an effective instrument for resolving the negative consequences of corruption for the individual, for specific groups or for society in general. Consequently, the human rights perspective on the negative impact of corruption emphasizes the State's obligation to take measures against the negative effects of corruption. Furthermore, preventive measures against corruption are strengthened by combining them with human rights. By integrating a human rights perspective into anti-corruption strategies, it also becomes an obligation to implement preventive policies in areas such as transparency, affidavits, laws on access to public information and external controls.

20. Corruption can lead to a human rights violation directly or indirectly. Corruption may directly violate a human right when a corrupt act is deliberately used as a means to violate a right or when a State acts or fails to act in a way that prevents individuals from enjoying that particular right. In other situations, corruption will be an essential factor contributing to a chain of events that eventually leads to the violation of a right. In this case, the right is violated by an act that derives from a corrupt act, and the act of corruption is a necessary condition for the violation. This situation will arise, for example, if public officials allow the illegal importation of toxic waste from other countries in return for a bribe, and that waste is placed in, or close to, a residential area. The rights to life and health of residents of that area would be violated, indirectly, as a result of the bribery.[14] Another

[13] Civil Law Convention against Corruption, ETS No. 174.

[14] Contribution by Mr. Alfred Karokora, Member of the Advisory Committee.

example is the situation of prisoners who are forced to pay bribes in order to avoid ill-treatment or to enjoy good conditions of detention; this kind of corruption affects a whole group indirectly.

21. Furthermore, there are parallels between the main anti-corruption principles (such as participation, transparency, access to information, and accountability) and the scope of human rights (such as freedom of expression and freedom of the media, access to information, and the principle of non-discrimination). Therefore, strengthening the enjoyment of human rights in general, and of specific political rights and the principle of non-discrimination in particular, is a valuable instrument in combating corruption. Whereas combating corruption through criminal law and private law means taking repressive and remedial measures, the promoting and strengthening of human rights is a preventative anti-corruption measure.

22. The need to integrate preventative measures into efforts against corruption has been clearly emphasized. Furthermore, promoting and strengthening human rights can, in the long term, contribute to a well-informed and emancipated civil society that is more and more able to reject corruption in every form and in all circumstances. According to OHCHR: "An efficient anti-corruption strategy must be informed by key human rights principles. An independent judiciary, freedom of the press, freedom of expression, access to information, transparency in the political system and accountability are essential both for successful anti-corruption strategies and for the enjoyment of human rights."[15]

23. The linkage between anti-corruption measures and human rights can also promote access to human rights mechanisms to combat corruption. A wide range of mechanisms exists for monitoring compliance with human rights at the national, regional and international levels. By drawing a link between acts of corruption and violations of human rights, new opportunities for litigation or monitoring can be identified.[16]

24. Combining strategies from the fight against corruption with strategies for the promotion of human rights can have a dual effect. On the one hand, human rights can form a part of an anti-corruption strategy via the use of human rights mechanisms. On the other hand, combating corruption is, in itself, a way of preventing human rights violations. By promoting the elements of good governance (such as political rights, transparency and accountability), human rights and anti-corruption efforts can be mutually reinforcing.[17] For example, the ability to promote and protect civil and political rights rests upon effectively combating political and judicial corruption (and vice versa). Transparency and access to information empower individuals to make informed decisions — from exercising their voting rights, to monitoring State expenditure. At the same time, creating such openness limits opportunities for abuses by politicians, the police and judges. By showing the impact of corruption on human rights, the reputational cost to businesses is too high, new risks are created, and they are thus provided with incentives to minimize their involvement in corruption. When accountability mechanisms are weak or non-existent, it becomes easy for corruption and for human rights violations to occur.[18]

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[15] *The Human Rights Case Against Corruption*, p. 5.

[16] International Council on Human Rights Policy and Transparency International, eds., *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities* (2010), p. 45 et seq.

[17] *The Human Rights Case Against Corruption*, p. 5.

[18] Contribution by Mr. Alfred Karokora, Member of the Advisory Committee; see also Sharon Eicher, *Corruption in International Business*, p. 8 et seq.

V. Are there experiences of integrating a human rights perspective into the fight against corruption?

25. Regarding the questionnaire responses that were received from States, human rights and anti-corruption institutions, NGOs and other stakeholders, it is pertinent to consider whether there were any experiences of integrating a human rights perspective into the fight against corruption. There are different institutional approaches to dealing with corruption. In a number of States, independent agencies have been charged with counteracting corruption. Other States, in their replies, make reference to agencies or departments of the government. The structure and organization of such agencies or other specialized institutions varies from State to State. In some States, NGOs are an important instrument in combating corruption. In addition, the inspection bodies (supreme audit institutions, for instance) play an important role; they are interested in human rights–based approaches and work collaboratively with civil society and human rights organizations. Other States mention criminal prosecution or human rights institutions as the main instruments used in the fight against corruption.

26. With regard to the integration of a human rights perspective into the fight against corruption via cooperation between anti-corruption institutions and human rights institutions, the questionnaire responses from States give a multifaceted picture. In some cases, it is established that no cooperation is taking place or that no effective cooperation exists. Often, it is said that there is no formal cooperation but that there are informal contacts, for example for meetings, workshops, lectures, common trainings, or exchanging information. As for cooperation on a more formal basis, inter-institutional working groups are mentioned. Some States speak of collaboration between the related institutions occurring on a case-by-case basis. In sum, many States emphasize the need for and the importance of cooperation between the anti-corruption institutions and human rights institutions, but at the moment, this cooperation is informal and ad hoc. This same result is seen in the questionnaire responses from national human rights institutions and also in some responses from NGOs.

27. Regarding the questionnaire responses from NGOs, it is notable that some of them quote examples of collaboration between anti-corruption institutions and human rights institutions. However, no information is provided about the ways in which this cooperation is taking place. The need for and importance of such cooperation is nevertheless stressed in some responses.

28. In this regard, the response from the Council of Europe should be highlighted. It provides an illustrative example of integrating a human rights perspective into the fight against corruption. As examples, the Council of Europe listed the Civil Law Convention on Corruption (mentioned earlier) and the establishment of the *Groupe d'États contre la corruption*, which invited the Council of Europe Commissioner for Human Rights to share his views on the impact of corruption on the effectiveness of human rights. In his view, the protection of victims of corruption, as well as of persons who report suspicions of corruption, should be seen as important tools in promoting both human rights and ethical behaviour.

29. The substance of the questionnaire responses from States and other stakeholders indicates that human rights play an important role in anti-corruption strategies. What is emphasized by some respondents is the importance of a well-informed and participatory society in order to combat corruption. This outcome will be aided by human rights education, which can raise awareness of corruption.